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NO. 81-94

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

JOSEPH J. REY, SR.
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RAYMOND C. CABALLERO
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El Paso, Texas 79901
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QUESTION PRESENTED

Does the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, as interpreted in Abney v. United States, 431 U.S. 651 (1977); and Burks v. United States, 437 U.S. 1 (1978), allow a defendant to appeal the question of the sufficiency of the evidence before being retried?

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REPORTED OPINIONS

The only reported opinion in this case is that of the Court of Appeals which is styled United States v. Rey, 461 F.2d 222 (1981).

JURISDICTION

The opinion by the Court of Appeals was filed on March 30, 1981, and the Court of Appeals denied rehearing on May 4, 1981. This Court has jurisdiction to grant its writ of certiorari under §3772 of Title 18, United States Code, and under Rule 20.1 of the Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment V to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

Section 1291 of Title 28, United States Code, provides as follows:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

Petitioner, a 60-year-old attorney, was indicted for conspiring to possess with the intent to distribute heroin in violation of §§841 and 846 of Title 21, United States Code (Count 1). Petitioner was also charged with using a telephone to facilitate the commission of a felony in violation of §843(b) of Title 21, United States Code (Counts 2-5).

Viewing the evidence at trial in a light most favorable to the Government, it showed that a Government informant, under direction of the Government, offered to sell heroin to the Petitioner. The Government actually delivered a small sample of heroin to a codefendant, then later, without Petitioner's knowledge, a larger amount of a counterfeit substance to the same codefendant.

Petitioner proceeded to trial alone before a jury. He moved for a judgment of acquittal at the end of the Government's case, and the trial court granted the motion as to Count 2, one of the telephone charges. Petitioner also moved for judgment of acquittal at the close of the case. The jury found Petitioner guilty on Counts 1, 3, 4, and 5, but the trial court entered a judgment of acquittal as to Counts 4 and 5, other telephone charges. The trial court denied Petitioner's motion for judgment of acquittal as to Counts 1 and 3.

Later, on motion of the defendant and with the concurrence of the Government, the court granted Petitioner's motion for new trial based on alleged trial court errors.

Petitioner then moved to dismiss the charges and filed his plea in bar, claiming that the trial court erred in

denying the motion for judgment of acquittal as to Counts 1 and 3 and contending that retrial would constitute double jeopardy.

The trial court denied the motion to dismiss and plea in bar, and Petitioner appealed. The Court of Appeals for the Fifth Circuit essentially dismissed the appeal and remanded the case for trial, holding that one could not appeal until after sentencing. The court held that the granting of a new trial apparently deprived Petitioner of appellate review of the sufficiency of the evidence.

The district court had jurisdiction to hear this case. Under §3231 of Title 18, United States Code, the "district courts of the United States shall have original jurisdiction, exclusive of the courts of the states, of all offenses against the laws of the United

States . . . ." Petitioner was charged with violating United States laws.

REASONS FOR GRANTING THE WRIT

It is well settled that a defendant cannot be retried upon the entry of a judgment of acquittal by the trial court prior to the time the jury returns its verdict. Fong Foo v. United States, 369 U.S. 141 (1962); and Kepner v. United States, 195 U.S. 100 (1904).

In Bryan v. United States, 338 U.S. 552 (1950), this Court held that a court of appeals could remand a case for retrial on a finding that the district court should have entered a judgment of acquittal if a defendant requested a new trial as one of the remedies. The basis for the finding was that Rule 29 of the Federal Rules of Criminal Procedure was not binding on the appellate courts and that under §2106 of Title 28, United States Code, courts of appeals could order a new trial as an appropriate remedy where the accused had requested a

new trial. Then in Burks v. United States, 437 U.S. 1 (1978), this Court overruled Bryan and its progeny and held that once an appellate court found the evidence insufficient to sustain a conviction, the Double Jeopardy Clause barred a new trial even if the accused requested one. Indeed, it really does not matter that a new trial is in fact granted. Hudson v. Louisiana, 101 S.Ct. 970 (1981).

Since it is clear that there can be no retrial if an appellate court determines that a trial court erred in denying a motion for judgment of acquittal, does it not stand to reason that an appeal prior to retrial is essential in order to safeguard the rights of the accused under the Double Jeopardy Clause?

Prior to this Court's decision in Abney v. United States, 431 U.S. 651

(1977), there was some question whether, under the final judgment rule, §1291, Title 28, United States Code, courts would permit the appeal of a trial court order entered before any sentencing and judgment of conviction. It was held there that a motion to dismiss an indictment on legitimate double jeopardy grounds could constitute a final, appealable order in order to preserve some basic right of an accused. See also, Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).

It was made clear by this Court in Abney that the Double Jeopardy Clause prohibited being put to trial twice. It is the double trial, not double conviction, which the clause prohibits. In effect, the court of appeals in this case stated that only upon conviction on a second trial can Petitioner obtain review of the first trial. In reviewing

the sufficiency of the evidence in the first and second trials together, and if the court of appeals agrees with Petitioner on the sufficiency question, the Court would then hold that under Burks REY should not have been tried the second time. The court of appeals is clearly saying that Petitioner must be tried twice in order to raise the double jeopardy issue. This Court has held that it is the possibility of a second trial under those circumstances which makes an appeal of the first trial possible under Abney.

This case raises significant, national questions in an area which is unsettled. Indeed, in its brief and during oral argument in the case, the Government attorney agreed that the court below should hear the sufficiency of the evidence under Abney. In a post

argument brief on this specific issue, the Government concluded:

> Accordingly, it does not appear that the manner in which the new trial is obtained will bar the right to an interlocutory appeal on double jeopardy grounds even where a new trial is occasioned by a defendant's own motion. (Supplemental Brief for the United States, p. 5)

Furthermore, there is a conflict on the issue in the circuits, as can be seen in the following decisions which have allowed such appeals. United States v. Gamble, 607 F.2d 820 (9th Cir. 1979); and United States v. Venable, 685 F.2d 71 (3rd Cir. 1978). See also, United States v. Charette, 625 F.2d 57 (5th Cir. 1980); United States v. Wright, 622 F.2d 792 (5th Cir. 1980); United States v. Garza, 603 F.2d 578 (5th Cir. 1979); United States v. Klande, 602 F.2d 108 (8th Cir. 1979); United States v. Calderon, 618 F.2d 88

(9th Cir. 1980); United States v. Brooks, 599 F.2d 943 (10th Cir. 1979); and United States v. Leonard, 593 F.2d 951 (10th Cir. 1979). Contra see, United States v. Becton, 632 F.2d 1294 (5th Cir. 1980); and United States v. Carnes, 618 F.2d 68 (9th Cir. 1980).

In fact, the issue is so confused and unsettled that there are conflicts, not only in positions taken by the Government in one case, but in the decisions within a circuit. The issue is simply too important to be left in such an unsettled and confusing state. It is an issue which arises often and will cause grave problems and hardships until settled.

CONCLUSION

For all the foregoing reasons, Petitioner urges this Court to grant its writ of certiorari in order to review this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of July, 1981, a true copy of the foregoing Petition for Writ of Certiorari was mailed to the Solicitor General, United States Department of Justice, Washington, D.C., 20530.

RAYMOND C. CABALLERO

Office-Supreme Court, U.S.
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ATTORNEY FOR PETITIONER

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

NO. 80-1033

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOSEPH J. REY, SR.,
Defendant-Appellant.

Appeal from the
United States District Court for the
Western District of Texas

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

(Opinion March 30, 1981, 5 Cir. 198_,
____F.2d____).

(May 4, 1981)

Before WISDOM, POLITZ and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the

suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

S/Sam D. Johnson
United States Circuit Judge

UNITED STATES of America,
Plaintiff-Appellee,

v.

Joseph J. REY, Sr.,
Defendant-Appellant.

No. 80-1033

United States Court of Appeals,
Fifth Circuit.
Unit A

March 30, 1981

Defendant brought interlocutory appeal from an order of the United States District Court for the Western District of Texas, Harry Lee Hudspeth, J., which denied his motion to dismiss government's indictment against him on grounds of double jeopardy. The Court of Appeals, Sam D. Johnson, Circuit Judge, held that: (1) claim that misconduct and overreaching from Drug Enforcement Administration involvement in criminal activity denied defendant his due process right to a fundamentally fair prosecution was outside scope of

review of interlocutory appeals; (2) denial of motion to acquit was not interlocutorily appealable; (3) allegation that an acquittal of other counts applied to remaining related count properly raised a double jeopardy issue from which an interlocutory appeal may be taken; and (4) acquittal on three counts charging use of a telephone to facilitate commission of possession of heroin with intent to distribute because telephone conversation for each count concerned only sham heroin was not related to the telephone facilitation count based on telephone conversation concerning real heroin; thus, retrial of defendant on a later telephone facilitation count would not place defendant in double jeopardy.

Appeal dismissed in part, affirmed in part.

Raymond C. Caballero, El Paso, Tex., for defendant-appellant.

LeRoy Morgan Jahn, Asst. U. S. Atty., San Antonio, Tex., for plaintiff-appellee.

Before WISDOM, POLITZ and SAM D. JOHNSON, Circuit Judges.

SAM D. JOHNSON, Circuit Judge:

Appellant Rey brings this interlocutory appeal from the district court's denial of his motion to dismiss the government's indictment against him on grounds of double jeopardy. This Court dismisses the appeal in part and affirms in part.

Rey and co-defendant Lozano were indicted jointly in Count One under 21 U.S.C.A. §§ 841(a)(1) & 846 for conspiracy to possess heroin with the intent to distribute. Each was charged separately with four and three counts respectively under 21 U.S.C.A. § 843(b) for using a telephone to facilitate the commission of possession of heroin with

intent to distribute. After Lozano pleading guilty to one of the telephone facilitation counts, the remaining counts against him were dismissed. Rey then proceeded alone to jury trial on the five counts against him.

At the close of the Government's case, Rey moved for acquittal. The district court denied this motion on all but Count Two, one of the telephone facilitation counts.[1] After the jury found Rey guilty on the remaining four counts, he moved for acquittal on them. The trial court granted acquittal on Counts Four and Five, two of the telephone facilitation counts,[2] and denied the motion on Count Three, the remaining facilitation count, and Count One, the conspiracy count. Because of arguably improper jury instructions, the court also granted Rey's motion for a new trial on Counts One and Three.[3] Rey

then filed a plea in bar on Counts One and Three on the ground that, because of insufficient evidence and governmental misconduct, double jeopardy barred retrial on them. The district court denied this motion. It is from this denial that Rey takes this interlocutory appeal.

I. Governmental Misconduct

[1] Rey raises three objections in this appeal. The first charges that misconduct and overreaching from Drug Enforcement Administration involvement in the criminal activity denied Rey his due process right to a fundamentally fair prosecution.[4] He then argues that, since the Government's conduct was so outrageous due process should have barred the first trial, he similarly should be able to interpose the due process claim to bar retrial. For the reasons below, this Court holds that

this due process claim is outside the scope of review in an interlocutory appeal and instead must be raised on direct appeal from a final judgment.

This appeal is founded on Abney v. United States, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). There the Court held that appellate courts have jurisdiction to entertain appeals from pre-trial orders denying dismissal on double jeopardy grounds. The Court reasoned that since the double jeopardy clause forbids a second trial, such a denial was within the "collateral order" exception in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), to the final judgment rule of appellate jurisdiction. The interlocutory appeal that Abney permits is limited to double jeopardy claims and does not include other challenges. Abney, 431 U.S. at

662-63, 97 S.Ct. at 2041-42 (claim for dismissal on ground of insufficiency of the indictment is not within interlocutory appeal). Therefore, this claim of denial of due process is not properly within an Abney appeal, and must independently qualify under Cohen's collateral order exception. Abney, 431 U.S. at 663, 97 S.Ct. at 2042.

[2] Collateral orders within the exception are those that conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and are effectively unreviewable on appeal from a final judgment. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351 (1978). In this case, it is clear that the initial requirement is met since the district court denied the motion to dismiss the indictment on its asserted ground of

governmental misconduct. This conclusively determined the disputed question. However, the second requirement is not met since the important due process issue is not completely separate from the merits of the action. Rather, it goes to Rey's guilt. This due process claim is similar to the claim of entrapment; in effect Rey argues that but for the governmental misconduct he would not have committed any offense. Finally, the due process claim can be effectively reviewed following judgment on the merits.[5] Therefore, this due process claim does not fall within Cohen's collateral order exception to the final judgment rule. Accord, United States v. Wright, 622 F.2d 792, 794 (5th Cir. 1980); United States v. Barham, 608 F.2d 602, 604 (5th Cir. 1979). This Court dismisses the appeal as to this issue.

II. Partial Denial of the Acquittal Motion: Insufficiency of the Evidence

[3] The second objection is that the district court should have granted the acquittal motion, and comprises three claims. Rey initially asserts that the evidence is insufficient to establish a conspiracy between himself and Lozano. Rey next claims that the Government's evidence, in rebuttal to Rey's initial showing of the defense of entrapment, is insufficient to show by a preponderance of the evidence his predisposition to commit the charged crime. His final claim is that there is insufficient evidence as to the underlying offense of possession for the telephone facilitation count.[6]

[4] These three claims of insufficient evidence--as to entrapment, conspiracy, and the underlying possession offense for the facilitation

count--cannot be resolved in this appeal. "Although in form the question presented here is that of denial of a motion asserting double jeopardy, in reality and substance the appellants seek review of their motions to acquit made at the first trial." United States v. Becton, 632 F.2d 1294, 1296 (5th Cir. 1980). That language accurately describes Rey's second objection.

Denials of motions to acquit are not interlocutorily appealable because, being nothing more than a motion for directed verdict, they are not collateral to the merits but are instead "precisely directed" to them. Becton, 632 F.2d at 1297. The second element of the collateral order test is thus not met. Indeed, by this appeal this Court is asked to decide whether the evidence is sufficient and the denial of the

acquittal motion erroneous. Id. at 1296. An appellate determination of the sufficiency of the evidence properly lies in an appeal after final judgment. If, on the other hand, the dismissal motion is founded on the interposition of a prior determination of insufficiency as a bar to retrial, then appeal from denial of that motion presents the appellate court with a double jeopardy claim. Id. Such a prior determination can be a jury finding of not guilty, a trial judge's grant of an acquittal motion, or an earlier appellate court reversal on insufficiency grounds, among others. See id. Put simply, the appellate court must be asked to decide whether there is a prior determination of insufficiency that bars retrial, not whether the evidence was insufficient.[7]

Here, the district court found the evidence sufficient to submit all but Count Two to the jury. The jury convicted defendant on all the other counts in the indictment. The trial judge then found, in ruling on the acquittal motion, that the evidence was insufficient to support the conviction only on Counts One and Three. The new trial on these counts was granted on procedural grounds. At no point was there a determination that the evidence on Counts One and Three was insufficient. In fact, all decisions throughout this proceeding were that such evidence was sufficient. Therefore, the claimed insufficiency of the evidence at Rey's first trial is properly decided only on appeal after any conviction in his second trial.[8] This Court also dismisses the appeal as to this issue.

III. Partial Denial of the Acquittal Motion: Acquittal on Related Counts

[5] Rey's third and final objection is that the district court should have disposed of Count Three of the indictment in the same manner as the other facilitation counts. In effect, Rey argues that the basis for acquittal on Counts Two, Four, and Five applies to Count Three. The assertion that a prior determination of insufficient evidence--the acquittal on the other counts--applies to the remaining related count properly raises a double jeopardy issue. See United States v. Tammaro, 636 F.2d 100 (5th Cir. 1981). This argument is not unlike that of collateral estoppel: The acquittal on the other facilitation counts necessarily determined a fact essential to Count Three, thereby precluding retrial on Count Three. See, e.g., United States v. Lee, 622 F.2d 787

(5th Cir. 1980); United States v. Larkin, 606 F.2d 1360 (5th Cir. 1979), modified on rehearing, 611 F.2d 585 (5th Cir. 1980), cert. denied, 444 U.S. 939, 100 S.Ct. 2168, 64 L.Ed.2d 793 (1980); United States v. Venable, 585 F.2d 71 (3d Cir. 1978). This Court, therefore, has jurisdiction over this interlocutory appeal from the denial of the motion to dismiss to the extent of this single ground of prior related acquittals.[9]

[6] Turning to the merits of Rey's double jeopardy argument, this Court finds none. The district court granted acquittal on Counts Two, Four, and Five because the telephone conversation for each count concerned only sham heroin. Since possession of sham substances is not an offense, United States v. Binetti, 552 F.2d 1141 (5th Cir. 1977), the court held that facilitation of such possession is also not an offense. Rey

argues that this reasoning also applies to Count Three since he was never in possession of real heroin, only of sham heroin.

The telephone conversation for Count Three, however, did concern real heroin: Rey arranged with the Government informant for delivery of a heroin sample. Lozano, Rey's co-conspirator, took delivery of the sample and tested it. Therefore, Rey knowingly and intentionally used the telephone to facilitate Lozano's possession of real heroin.[10] Though the counts are related, the basis for the acquittal on Counts Two, Four, and Five is thus inapplicable to Count Three. The acquittal on the other counts, therefore, does not place Rey in double jeopardy with respect to retrial on Count Three. Accordingly, this Court affirms the district court's denial of

the motion to dismiss the indictment on double jeopardy grounds.

APPEAL DISMISSED IN PART, AFFIRMED IN PART.

FOOTNOTES

[1]Although the court did not expressly state the reasons it granted acquittal on Count Two, it appears from a review of the record that it must have been the same as the reason the court gave when it later acquitted defendant on Counts Four and Five, two other telephone facilitation counts.

[2]The court granted these acquittals because the evidence showed that the substance that was the subject of each telephone conversation alleged in those counts was sham heroin and not "heroin" as alleged in the indictment. Since possession of sham substances with intent to distribute is not an offense, see United States v. Binetti, 552 F.2d 1141 (5th Cir. 1977), facilitation of such possession is also not an offense. The acquittal motion was denied, however, on Count Three since the subject of its telephone conversation was real rather than sham heroin.

[3]The district had refused to give the jury two of Rey's requested instructions because it felt that Rey's theory of defense was adequately presented elsewhere in the charge. The motion for new trial was granted, however, because the court, out of an abundance of caution, desired to ensure that the jury charge completely and sufficiently present all defensive theories.

[4]This undue participation is alleged to exist because the DEA supplied illegal substances to the defendants when Rey's prior involvement in drugs is allegedly not demonstrable.

[5]In Abney the third prong of the collateral order test was met because the legal and practical value of the asserted right would be destroyed if it were not vindicated before trial. In other words, appeal after final judgment would not be able to effectively review or cure the denial of a fundamental right. This was because the double jeopardy clause protects not only against a second conviction for the same crime, but against the second trial itself. Any due process protection here is against conviction for a crime committed in the context of improper governmental conduct. As noted in Abney, the right to not be convicted twice for the same crime can be fully vindicated on an appeal following final judgment. 431 U.S. at 660, 97 S.Ct. at 2040.

[6]The elements of proof for the § 843(b) facilitation count are (1) knowing or intentional (2) use of a telephone (3) to facilitate the commission of an offense. It is this third element that is the focus of Rey's insufficiency challenge. Whatever underlying offense is charged must be proved by a preponderance of the evidence, even though it is not separately charged. See United States v. Watson, 594 F.2d 1330, 1342-43 (10th Cir. 1979), cert. denied sub nom. Brown v. United States, 444 U.S. 840, 100 S.Ct. 78, 62 L.Ed.2d 51 (1979); United States v. Thomas, 586 F.2d 123, 130-31 (9th Cir. 1978); United States v. Hannah, 584 F.2d 27, 28-30 (3d Cir. 1978); United States v. Pierorazio, 578 F.2d 48, 50-51 (3d Cir. 1978), cert. denied, 439 U.S. 981, 99 S.Ct. 568, 58 L.Ed.2d (1978). When the underlying

offense is an inchoate one such as attempt or conspiracy, then the attempt or conspiracy is all that must be showing to establish the underlying offense, and it is not necessary to show completion of the objective of that inchoate crime. Thomas, 586 F.2d at 130-31; Pierorazio, 578 F.2d at 50-51. when the Government charges as the underlying offense the substantive object of the inchoate crime rather than the attempt or conspiracy itself, then by definition the Government must prove the completed object when establishing the underlying offense. See Watson, 594 F.2d at 1342-43 (underlying offense of possession with intent to distribute supported by sufficient evidence). In this case the underlying offense charged was possession of heroin with intent to distribute. Rey claims that there is insufficient evidence of possession because Rey's co-conspirator Lozano took delivery of the actual heroin and that Rey himself received only sham heroin.

The Government argues that Rey was in constructive possession of the real heroin. Constructive possession, as much a violation of § 841 as is actual possession, exists if the defendant knowingly has the power and intention to exercise dominion or control over a thing either directly or through another person. United States v. Martinez, 588 F.2d 495, 498 & n.3 (5th Cir. 1979). In the context of conspiracy, constructive possession is similar to the theory of attributed possession. United States v. Hodges, 606 F.2d 520, 523 (5th Cir. 1979), cert. denied, 444 U.S. 1035, 100 S.Ct. 708, 62 L.Ed.2d 671 (1980) (co-conspirator's drug possession attributed to defendant if committed in furtherance

of conspiracy and is within reasonably foreseeable scope of conspiracy).

Evidence of the power of control in this context requires a showing of the existence of the conspiracy, which Rey argues is not supported by sufficient evidence. Section 843(b), however, is not so narrow as to require that the facilitator commit the facilitated offense. The statute can be satisfied by the knowing or intentional use of the telephone to facilitate another person's commission of an offense. Therefore, the sufficiency analysis must focus on proof of Lozano's actual possession of heroin with intent to distribute.

[7]Had the district court set not only Counts One and Three for new trial, but any of the counts on which Rey was granted acquittal, Rey could have presented to this Court by way of interlocutory appeal the claim that he could not be retried on any of the acquitted counts.

[8]United States v. Wilkinson, 601 F.2d 791, 795 (5th Cir. 1979) (decision denying acquittal motions in first trial reviewable in appeal from second conviction, if any). Contrary to Rey's assertion, Wilkinson should not be read as implying that a denial of an acquittal motion is interlocutorily appealable. Id. at 794. It then went on to hold that the advent of interlocutory double jeopardy appeals under Abney in no way affected the defendant's right to raise in an appeal from the second trial any alleged errors, such as a denial of an acquittal motion, made in the first trial. Id. at 795. The plain implication is that there is no such diminution of the

defendant's rights precisely because the Abney appeal does not encompass denials of acquittal motions.

It should also be noted that successfully moving for a new trial does not affect the appealability of a subsequent denial of a dismissal motion on double jeopardy grounds. See, e.g., United States v. Venable, 585 F.2d 71 (3d Cir. 1978). More often, interlocutory double jeopardy appeals follow a court order of new trial occasioned by the defendant's successful motion for mistrial. See, e.g., United States v. Charette, 725 F.2d 57 (5th Cir. 1980). The effect of the new trial, rather, is to preclude review of errors in the first trial until appeal from conviction, if any, in the second, unless the issue raised is properly within the collateral order or any other exception to the final judgment rule of appellate jurisdiction. Had a new trial not been ordered here, Rey could have presented to this Court by way of direct appeal from the final judgment his claim of insufficient evidence. Because of the new trial, however, this claim must await the appeal, if any, from the outcome of Rey's second trial.

[9] Becton is not to the contrary. In Becton the defendant moved for acquittal at the end of the Government's case. This motion was denied. The jury deadlocked and mistrial was declared. The acquittal motion was renewed after the jury's discharge. This was partly granted but in the main denied. When the remaining counts were set for retrial, the defendant renewed the motion to acquit and made an additional motion to dismiss on double jeopardy grounds. Because the jury was hung, the

double jeopardy argument ran, the evidence was insufficient. The motions to acquit and dismiss were denied. This Court dismissed the appeal from that denial.

A close reading of Becton, however, shows that this Court actually took jurisdiction of the only possible double jeopardy claim and then reached the merits of it. two claims were presented on appeal in Becton: that the denial of the motion to acquit was erroneous, clearly a claim outside a proper interlocutory appeal, and that the inability of the jury to convict or acquit was a prior determination that the evidence was insufficient, a claim which, if true, would bar retrial on double jeopardy grounds. This Court held that a hung jury is not a determination that the evidence is insufficient, but only an inability to say whether the evidence was or was not sufficient for reasons that may or may not relate to the sufficiency of the evidence. 632 F.2d at 1296. Having disposed of the merits of the double jeopardy claim adversely to defendant, there remained nothing more to the appeal. Although in matters of jurisdiction precision is desirable, Becton cannot be faulted for dismissing the appeal rather than affirming the denial of the motion to dismiss since the outcome was exactly the same in either case--review of the sufficiency claims was delayed until any appeal from a final judgment in the second trial.

[10]Part of Rey's argument that the acquittal of Counts Two, Four, and Five applies to Count Three proceeds on his assumption that the Government must prove Rey's actual possession. As note

6 supra makes clear, however, the statute does not require the facilitator commit the underlying offense, only that he facilitate its commission. This includes facilitating another person's commission of the underlying offense. In this case, Rey facilitated Lozano's possession. Of course, whether the evidence is sufficient to show Lozano's possession of heroin with intent to distribute, and therefore whether the Government showed all elements of Count Three, is a matter not properly before this Court at this time.

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No. 81-94

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOSEPH J. REY, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he should have been allowed to take an immediate appeal from the district court's denial of his motion to dismiss the indictment on the ground that the evidence at his first trial was insufficient.

1. Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on one count of conspiring to possess heroin with intent to distribute it, in violation of 21 U.S.C. 846, and three counts of using the telephone with intent to commit a narcotics of-

fense, in violation of 21 U.S.C. 843(b). After trial, the district court granted petitioner's motion for a judgment of acquittal on two of the substantive counts,[1] but it denied the motion with respect to the conspiracy count and the other substantive count. However, the court granted petitioner's motion for a new trial on those counts because of arguably improper jury instructions (Pet. App. 5-6).

Prior to his second trial, petitioner filed a "plea in bar," claiming that because of governmental misconduct during the investigation of the case and insufficient evidence during the first trial, due process and double jeopardy principles prohibited the government from retrying him on the two remaining counts (Pet. App. 6-7). After finding the government's evidence to be sufficient (*id.* at 14), the district court denied the motion. Petitioner then attempted to take an interlocutory appeal from that denial.

2. The court of appeals dismissed the appeal in part and affirmed the district court's order in part. First, the court held that petitioner could not take an immediate appeal from the portion of the district court's order holding that his second trial was not barred by government misconduct during the investigation. Due process claims, the court held, do not fall within the narrow range of claims that can be raised on interlocutory appeal (Pet. App. 7-10). Second, the court held that petitioner could not appeal from that portion of the district court's order rejecting his claim that the evidence at the first trial was insufficient. That portion of the appeal, the court stated, was in effect an effort to obtain review of the

[1] The court had dismissed a third substantive count during the trial.

district court's failure to grant a judgment of acquittal at the conclusion of the first trial, an order that could not be challenged on an interlocutory basis (Pet. App. 11-14). Finally, the court of appeals held that there was no merit to petitioner's claim that he should also be acquitted on the remaining substantive count because a conviction would be barred by his acquittal on the other substantive counts at the first trial. While the court held that this claim was reviewable on an interlocutory basis, it concluded that there was no inconsistency between the district court's acquittal of petitioner on three of the substantive counts and its order that petitioner be retried on the remaining substantive count (Pet. App. 15-18).[2]

3. Petitioner contends (Pet. 5-10) that, under *Abney* v. *United States*, 431 U.S. 651 (1977), he was entitled to immediate appellate review of the district court's pretrial ruling denying his motion to dismiss the indictment. According to his submission, *Abney* requires the court of appeals to decide, before any retrial, whether the evidence presented by the government during the first trial was legally sufficient to

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[2] The district court acquitted petitioner on three of the substantive counts (one during trial and the other two after trial) because the telephone conversations at issue in each of those counts involved sham heroin. The telephone conversation at issue in the remaining substantive count, however, involved real heroin, and could thus support a valid conviction (Pet. App. 16-17).

We note our disagreement with the court of appeals' conclusion that collateral estoppel claims should be reviewable prior to final judgment. As we view such claims, they assert a right not to be *convicted*, rather than a right not to be *tried*, and therefore are capable of adequate vindication on appeal from a final judgment. We do not, however, ask the Court to consider the issue in this case.

sustain a conviction. In the absence of such a determination, petitioner claims, he may not be retried consistent with this Court's decision in *Burks* v. *United States*, 437 U.S. 1 (1978). For the reasons set forth in the opinion of the court of appeals (Pet. App. 11-14), petitioner's claim is without merit.

In *Abney*, this Court determined that a double jeopardy claim was reviewable on an interlocutory basis. The defendants in *Abney* asserted that, because the original indictment against them had been "duplicitous" and the jury had returned a general verdict of guilty, the jury may have acquitted them on one of the charges contained in the duplicitous indictment while convicting them on the other. They contended that the Double Jeopardy Clause barred their retrial following reversal of their conviction on appeal, in light of this possible "acquittal" by the jury. 431 U.S. at 664.

Abney concluded that this double jeopardy claim was "collateral to, and separable from, the principal issue at the accused's impending criminal trial, *i.e.*, whether or not the accused is guilty of the offense charged." 431 U.S. at 659. The Court emphasized that the "defendant makes no challenge whatsoever to the merits of the charge against him" (*ibid.*). It also observed that the "elements of [the double jeopardy] claim are completely independent of his guilt or innocence" (*id.* at 660). Since the order challenged on appeal was completely "collateral" to the issue of guilt or innocence, and since effective relief could not be afforded on review following final judgment after retrial, the Court approved immediate review.

Abney also held, however, that other claims asserted by the defendant could not be appealed on an interlocutory basis. In particular, this Court re-

jected the assertion that a defendant in a criminal case is entitled to interlocutory review of a pretrial order sustaining the indictment (431 U.S. at 663):

> [A]n order denying a motion to dismiss an indictment for failure to state an offense is plainly not "collateral" in any sense of that term; rather it goes to the very heart of the issues to be resolved at the upcoming trial.[3]

The decision of the district court in this case, ruling that the government had presented sufficient evidence to justify a finding of guilt, is a classic example of a pretrial order that "goes to the very heart of the issues to be resolved at * * * trial." Rather than being "completely independent of [the issue of] guilt or innocence," the challenged order relates directly and exclusively to the merits of the prosecution. As the court of appeals explained (Pet. App. 11-12):

> These * * * claims of insufficient evidence * * * cannot be resolved in this appeal. "Although in form the question presented here is that of denial of a motion asserting double jeopardy, in reality and substance the appellants seek review of their motions to acquit made at the first trial." * * *

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[3] *Abney* thus reaffirmed the well established rule that a pretrial order that does not meet the standards of a "collateral order," as prescribed in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), is not subject to an immediate appeal. This is true even though reversal of the order on appeal would obviate the need for a trial. See, *e.g.*, *United States* v. *MacDonald*, 435 U.S. 850, 860 & n.7 (1978); *Heike* v. *United States*, 217 U.S. 423, 430-431 (1910); *Cobbledick* v. *United States*, 309 U.S. 323, 325-326 (1940). Immediate review is not available to test claims that are "enmeshed in the factual and legal issues" to be resolved during the trial on the merits. *Firestone Tire & Rubber Co.* v. *Risjord*, No. 79-1420 (Jan. 13, 1981), slip op. 9.

> Denials of motions to acquit are not interlocutorily appealable because, being nothing more than a motion for directed verdict, they are not collateral to the merits but are instead "precisely directed" to them. * * * The second element of the collateral order test is thus not met.

On this basis, the courts of appeals repeatedly have concluded that a "denial of a motion for acquittal is not a final, appealable decision [under *Abney*] even when made after a hung jury mistrial." *United States* v. *Carnes*, 618 F.2d 68, 70 (9th Cir.), cert. denied, 447 U.S. 929 (1980); accord, *United States* v. *Ellis*, 646 F.2d 132, 134-135 (4th Cir. 1981); *United States* v. *Young*, 544 F.2d 415, 416 (9th Cir.), cert. denied, 429 U.S. 1024 (1976). In light of these precedents, the court below correctly dismissed petitioner's appeal from the district court's denial of his motion to dismiss the indictment.[4]

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[4] Contrary to petitioner's contention (Pet. 9), there is no conflict among the circuits on this issue. None of the cases petitioner cites (Pet. 9-10) involved double jeopardy claims that were premised on an asserted insufficiency of the government's evidence at the first trial. In each of those cases (except *United States* v. *Venable*, 585 F.2d 71 (3d Cir. 1978)), the double jeopardy issue was based on a claim that misconduct by the prosecutor during the first trial had caused a mistrial, and that a second trial therefore should not be permitted. The *Venable* case involved a claim of collateral estoppel, not a claim based on the alleged insufficiency of the government's evidence at the first trial. Thus, in none of the cited cases was the court of appeals asked to assume the substantial burden of reviewing the sufficiency of the government's evidence at an interlocutory stage in the proceedings in the district court.

If, moreover, interlocutory review were available to evaluate the sufficiency of the government's evidence in every

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[5]

LAWRENCE G. WALLACE
Acting Solicitor General

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case in which the district court granted a retrial on the basis of erroneous jury instructions or similar trial error, the delay introduced in criminal prosecutions would be substantial. In a large category of cases, criminal defendants would be empowered to delay their retrials while they prosecuted interlocutory appeals in the courts of appeals and sought review by certiorari in this Court. That would be inconsistent with previously recognized limitations on the "collateral order doctrine," which applies only to "a small class" of interlocutory orders and is a "narrow exception" to the final judgment rule. *Firestone Tire & Rubber Co.* v. *Risjord, supra,* slip op. 6.

[5] This Court recently has denied certiorari in two cases raising the same issue. See *Kuhn* v. *United States,* No. 80-1715 (June 8, 1981); *Hannigan* v. *United States,* No. 80-1165 (Mar. 9, 1981).

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